

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3202 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

HIMANSHU JASHVANTRAI MEHTA

Versus

BHUPENDRA RASIKLAL SHAH

Appearance:

MR RD DAVE for Petitioners

MR KD VASAVADA for Respondent No. 1

MR KP RAVAL, ADDL. PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 23/03/2000

ORAL JUDGEMENT

1. This is an application u/s 482 of the Criminal
Procedure Code, at the instance of the four applicants

who are original accused Nos. 1 to 4 respectively, in a complaint filed by respondent No.1 u/s 138 read with section 141 of the Negotiable Instruments Act.

It is pertinent to note that the said complaint is specifically u/s 138 read with section 141 of the said Act. The learned Magistrate, after following the due procedure, issued process to all the four accused.

2. On the facts of the case, it would be more convenient to deal with the contentions raised by learned counsel for the applicants, separately in respect of each of the accused.

3. So far as accused No.1 is concerned, the statutory notice issued by the complainant u/s 138 of the Act and sought to be served by Registered Post A.D., has admittedly been returned to the sender, the original cover of which bears various endorsements made by the postman. With the assistance of learned counsel for the parties, I have examined the original cover. The endorsements bear different dates following the endorsements "Not available" and "N.F.". The latter endorsement would mean "Not found". The dates noted below these endorsements by the postman are 1st December 1995, 2nd December 1995, 4th (9th?) December 1995 and 11th December 1995. Apart from these four dates, the postman has endorsed the cover by stating that, "since the party was not found on these dates, it may be returned to the sender". The postman has then signed it and put the date of 11th December 1995 below this endorsement, and signature.

Learned counsel for the applicant sought to contend that this cannot be said to be good service. On the other hand, learned counsel for the complainant sought to contend that since actual service was deliberately avoided by the first accused, reliance can be placed upon section 27 of the General Clauses Act and a presumption can be drawn as to good service.

To my mind, the submission of learned counsel for the complainant is, in this limited context, merely academic. If the Court were to assume good service on the basis of the endorsements that the addressee was not found on the four dates mentioned on the cover, the presumption as to good service can only be made in respect of the last date, and not on the first date. At best, therefore, accused No.1 could be deemed to have served with the statutory notice on 11th December 1995. In that case, in view of the admitted fact that the

complaint is dated 19th December 1995, filed on the same day, the complainant is examined on the same day and process has been issued on the same day, would render the complaint premature so far as the accused No.1 is concerned. This is obvious in view of section 138, clause (c) of the proviso thereto. In other words, the statute requires that the drawer of the cheque which has been dishonoured is entitled to 15 days notice to make good the payment in respect of the dishonoured cheque, and only in case of his failure to do so, can the Court take cognizance of the complaint in that regard. As aforesaid, on the facts pertaining to accused No.1, if he is deemed to have been served on 11th December 1995, a complaint filed on 19th December 1995 is obviously premature.

4. Thus, the complaint, as also the process issued in that regard as against accused No.1 is required to be quashed and set aside. It is accordingly so directed.

5. Next we may consider the case of accused No.3. In this context, learned counsel for the applicant contends that accused No.3 has not been served at all, and neither can any presumption be drawn in that regard. The submission is made in this regard by learned counsel for the complainant, except to state that accused No.3 must be deemed to have been served inasmuch as she has replied to the statutory notice. However, this Court is not concerned with investigating facts extraneous to those which appear on record before the learned Magistrate at the relevant stage of the matter, neither is this Court concerned for recording and taking note of other evidence which may or may not be sought to be produced in the present proceedings.

Even otherwise, the complaint does not disclose or even assert that accused No.3 has been served with the statutory notice and has failed to meet with the requisite demand within 15 days of the date of service. Even otherwise, the complaint is premature for the same reasons, as in the case of Accused No.1, as discussed hereinabove. For this reason also, the complaint qua accused No.3 is required to be quashed and set aside and as a consequence thereof, the process issued against this accused. It is so directed.

6. This leaves for consideration the contention raised on behalf of the accused Nos. 2 and 4. It is sought to be contended that accused Nos. 2 and 4 (inter alia) were not partners of the firm on whose behalf the cheque in question was issued, inasmuch as the firm had

been dissolved to the knowledge of the complainant long before the due date of the cheque. It was further contended that this aspect has not been referred to in the complaint at all. However, whether the firm was in existence on the date on which the cheque became due or not, or whether it was dissolved prior to the due date, is a matter of evidence which can be led before the learned Magistrate, particularly since it constitutes the defence of these accused on the merits of the case. This is not a point to be investigated by this Court for the purpose of ascertaining whether the issuance of the process on the basis of the complaint was justified or not.

7. It was further sought to be contended on behalf of the applicants that the cheques in question were in fact post-dated [on the date when they were issued] and further that the said cheques were cancelled before the due date, that is to say, the date of maturity. However, this is a contention which cannot arise from the contents of the complaint or from the examination of the complainant, but at best may constitute a defence on merits, which the trial Court would obviously consider in the light of the evidence that may be led before it. This contention therefore has no bearing at this stage of the matter.

8. Learned counsel for the applicants then sought to contend that the statutory notice issued u/s 138 by the complainant is not in compliance with the requirement of the said section, inasmuch as the demand made therein is both vague, as also exceeds the amount of the dishonoured cheques in question. No doubt, the statutory notice raises two demands. There cannot however be any difference of opinion that the two demands are not to be read together, but are in the alternative to each other, and the choice of which demand is to be met is left entirely to the addressee of the notice, that is to say, the drawer of the cheque. On the facts of the case, the first demand refers to an amount larger than the amount of the dishonoured cheques, which is obviously explained as the total civil liability asserted and claimed by the complainant. On the other hand, the alternative demand, which is specifically made as an alternative to the first, is a plain and simple demand of Rs. 2 lacs, representing the four dishonoured cheques of Rs.50,000/each. It cannot possibly therefore be said that the notice is either vague and indefinite, nor could it be suggested that it affirmatively constitutes any demand which is in excess of the amount of the dishonoured cheques.

Learned counsel for the applicants then sought to contend that even the alternative demand representing the amount of the dishonoured cheques is not a simple demand in this context, but is coupled with the demand for interest in respect of the amount of the dishonoured cheques. According to him therefore, if the demand for interest over and above the amount of the dishonoured cheques is the claim made in the statutory notice, the totality of such a claim would obviously fall outside the parameters of section 138 of the Act.

However, the Supreme Court has dealt with this particular issue in the case of Suman Sethi v/s Ajay K. Churiwal & another reported in J.T. 2000 (1) SC 493, wherein it has been laid down that where the statutory notice u/s 138 makes a claim, apart from the claim of the dishonoured cheques, in the nature of incidental claims, and where such incidental claims are clear and severable, merely because such incidental claims have been preferred, will not invalidate the notice.

9. In the premises aforesaid, I find that there is no case made out by applicant Nos. 2 and 4 for quashing the complaint or for quashing the process issued against them. The present application qua applicant Nos. 2 and 4 is therefore dismissed.

10. Rule is accordingly made absolute to the aforesaid extent only.

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